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Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

Morris D. Murphy

Petitioner

v.

State of Maine,

Respondent

On Petition For Writ of Certiorari to the Maine Supreme Judicial Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an affidavit interpreting, summarizing or certifying to the substance or effect of the accused's motor vehicle record, which is prepared for use in a criminal prosecution, is subject to the demands of the Sixth Amendment Confrontation Clause, as set forth in *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Morris D. Murphy respectfully petitions for a writ of certiorari to the Maine Supreme Judicial Court in *State of Maine v. Morris D. Murphy*, Docket No. CUM-09-240.

OPINION BELOW

The memorandum and order of the Supreme Judicial Court of Maine (Appendix ("App.") App. 1-23) is reported at 991 A.2d 35, 2010 ME 28. The relevant trial court proceedings and order are unpublished.

JURISDICTION

The Maine Supreme Judicial Court, the highest court in the State, decided this case. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right. . . to be confronted with the witnesses against him . . . ."

Chapter 29-A of the Maine Revised Statutes §113 provides in relevant part: "notwithstanding any other law or rule of evidence, the certificate of the Secretary of State or a deputy, under seal of the State, must be received in a judicial or administrative proceeding as prima facie

evidence of any fact stated in the certificate or documents attached to the certificate."

STATEMENT OF THE CASE

In Maine, the prosecutor of a crime such as Operating After Suspension is allowed to introduce a certificate of the Secretary of State in order to establish the elements of a crime, including the element of 'notice.' Under Maine law, a Secretary of State's written certification is sufficient, in and of itself, to establish prima facie proof of anything it says:
"notwithstanding any other law or rule of evidence, the certificate of the Secretary of State or a deputy, under seal of the State, must be received in a judicial or administrative proceeding as prima facie evidence of any fact stated in the certificate or documents attached to the certificate." 29-A M.R.S.A. §113. Therefore, it is unnecessary for the prosecutor to call any witness in order to establish the certain elements of a crime when those elements are written in an affidavit prepared by the Secretary of State, even if the accused requests that they produce a witness.

On October 15, 2008, Christopher Woodcock, an officer with the Cumberland Police Department pursued a vehicle driven by Morris Murphy after observing Murphy and mistakenly concluding that he had pulled the same driver over days earlier for operating after suspension. Officer Woodcock executed a traffic stop, ran the car's license plate, and was informed that Murphy's driver's license was suspended. Murphy was arrested and charged with violations of (1) 29-A M.R.S.A. §2412-A(1-A)(D) Operating While License

Suspended or Revoked and (2) 29-A M.R.S.A. §2102(1) Unlawful Use of License.[1]

Murphy entered a not guilty plea. Through discovery, he was provided with an affidavit of the Secretary of State (App. 24-25) which stated:

> I, the Secretary of the State of Maine, certify that
>
> The office of the Secretary of State is the legal repository of the Great Seal of the State of Maine and also custodian of the records relating to the revocation,

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[1] The Maine statute defining the offense of operating after suspension ("OAS") provides, in relevant part:

> 1-A. Offense; penalty. A person commits operating while license suspended or revoked if that person:
>
> A. Operates a motor vehicle on a public way or in a parking area when that person's license has been suspended or revoked, and that person:
>
> 1) Has received written notice of a suspension or revocation from the Secretary of State or a court;
>
> 2) Has been orally informed of the suspension or revocation by a law enforcement officer or a court;
>
> 3) Has actual knowledge of the suspension or revocation;
>
> 4) Has been sent written notice in accordance with section 2482 or former Title 29, section 2241, subsection 4; or
>
> 5) Has failed to answer or to appear in court pursuant to a notice or order specified in section 2605 or 2608.

29-A M.R.S.A. §2412-A(1-A).

restoration and suspension of operators' licenses and registrations, and that the paper to which this is attached is a true copy from the records of this office.

I further certify that, according to our records the license or right to operate of

Morris D. Murphy, whose date of birth is July 9, 1958, was suspended effective September 15, 2008 by the Secretary of State

Notice of suspension was sent by regular mail, no later than September 5, 2008 in accordance with the provisions of 29-A MRSA Section 2482(1).

Morris D. Murphy's right to operate was under suspension on October 15, 2008 because the statutory conditions for restoration had not been satisfied.

I further certify that the attached copy is a true copy of Morris D. Murphy's driving record as maintained by the Secretary of State as of this date.

Prior to trial, Murphy filed a motion in limine (App. 26-27) citing to *Crawford v.*

Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), and asserting that the State's intended admission of the affidavit of the Secretary of State, absent the testimony of the affiant, and having not had the prior opportunity to cross-examine the affiant, would violate Murphy's Sixth Amendment rights under the U.S. Constitution to confront the witnesses against him.. The trial court denied the motion (App. 30-31).

At trial, the State and Murphy stipulated to the fact that his license was under suspension at the time of the arrest. The State's case consisted of the testimony of the arresting officer, and three exhibits that were admitted into evidence: (1) Murphy's driver's license, which was admitted without objection; (2) the certificate from the Secretary of State (App. 24-25); and (3) a copy of the letter from the Bureau of Motor Vehicles that notified Murphy of his suspension (App. 38-39). Exhibits 2 & 3 were admitted over Murphy's renewed *Crawford*/6th Amendment objection (App. 32).[2]

Thus, the only evidence offered by the State to establish that Murphy had knowledge or notice of the suspension of his license on the date of the arrest, as required by §2412-A, was

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[2] The officer didn't offer any testimony on the element of whether or not Murphy had 'notice' of his suspension at any time prior to the arrest.

the affidavit of the Secretary of State and the BMV notice of suspension letter.[3] [4]

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[3] Contrary to the representations contained in the affidavit of the Secretary of State, no copy of Murphy's driving record was attached to the affidavit.

[4] The requirements of the written notice provision referenced in §2412-A (1-A)(4), are set forth by statute as follows:

> 1. Notification by Secretary of State. Upon determining that a person is subject to license suspension or revocation, the Secretary of State shall immediately notify the person, in writing, of the license suspension or revocation. The notice:
> A. Must be sent to the last name and address provided under section 1407 or, if the person has not applied for a license, on record with the Secretary of State;
> B. Must be sent to the address provided in the report of the law enforcement officer if that address differs from the address of record; or
> C. May be served in hand.
> 2. Notice contents. The notice must clearly state:
> A. The reason and statutory grounds for the suspension or revocation;
> B. The effective date of the suspension or revocation;
> C. If the suspension or revocation is imposed by an authority other than a court, the right of the person to request a hearing and the procedure for requesting a hearing; and
> D. and E. (Repealed)

After being instructed that they could rely solely on the affidavit as sufficient proof of any facts stated within it (App.35) the jury returned verdicts of guilty on both Counts. The Court sentenced Murphy to a $500.00 fine and 48 hours in jail on Count I, and on Count II he was sentenced 24 hours in jail to be served concurrent with Count I.

The Maine Supreme Judicial Court affirmed the trial Court's decision. In doing so, the Court interpreted *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), as *not* extending the definition of testimony subject to 6th Amendment protection to include sworn affidavits that interpret and summarize records.

REASONS FOR ALLOWANCE OF THE WRIT

F. If the suspension or revocation is based on a report under section 2481, that a copy of the report of the law enforcement officer and any blood-alcohol test certificate will be provided to the person upon request to the Secretary of State.

3. Receipt date. The notice is deemed received 3 days after mailing, unless returned by postal authorities.

4. Effective date. A suspension or revocation is effective on the date specified by the Secretary of State on the notice, which may not be less than 10 days after the mailing of the notification of suspension by the Secretary of State.

29-A M.R.S.A. §2482.

In *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009) this Court elaborated on its post- *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) Confrontation Clause jurisprudence by holding that government drug chemist affidavits reporting the result of forensic analysis of seized substances were testimonial and, therefore, their admission violated the Confrontation Clause. The thrust of the Court's *Crawford* line of cases is that affidavits or other documents, which are prepared for litigation, and which interpret and provide testimony, rather than merely authenticating records, when admitted without opportunity at trial or prior to trial to confront the witness, violate the Confrontation Clause.

The *Melendez-Diaz* Court's characterization of clerk's certificates attesting to the absence or nonexistence of records (commonly referred to as a certification of nonexistence of record, or "CNR") as a testimonial statement is quite possibly the most significant language contained in the opinion which is applicable outside of the forensic science area. 129 S.Ct. at 2539. Such CNR affidavits, or affidavits otherwise interpreting or certifying to the substance or effect of a record, have in recent history come to have been relied upon by the prosecution in a broad range of criminal cases, including, motor vehicle cases (*State v. Tayman*, 960 A.2d 1151 (Me. 2008)(Secretary of State's affidavit prepared for use at trial admissible because it serves only to confirm the authenticity of the underlying motor vehicle

records which themselves contain only routine nontestimonial information)), carrying a handgun without a license cases (*Millard v. U.S.*, 967 A.2d 155 (D.C. 2009)(certification of no record for license to carry pistol and no record of registered firearm not testimonial)), possession of an unregistered firearm cases (*U.S. v. Giambro*, 544 F.3d 26 (1st Cir. 2008)(CNR from ATF records custodian concerning lack of firearm ownership registration not testimonial)), tax cases (26 U.S.C. §7203 allows government to rely on a CNR to establish that no tax return is filed for a particular year in a failure to file return case & 26 U.S.C. §7201 which allows CNR in a tax evasion case), immigration cases (*U.S. v. Earle*, 488 F.3d 537 (1st Cir. 2007)(CNR admitted to establish that no request for permission to re-entry was previously filed in a prosecution for illegal entry after deportation)), failure to register as a sex offender cases (*Dickens v. Commonwealth*, 663 S.E.2d 548, 551-52 (2008)(CNR admissible)), and others.

Post-*Crawford*, but prior to *Melendez-Diaz*, most, but not all, of the Courts that considered these various uses of affidavits found such evidence to be nontestimonial, and therefore, not violative of the confrontation clause. Following *Melendez-Diaz*, Court's have been logically rethinking this issue, and a split of authority has emerged.

These license and permitting types of cases represent an enormous volume of cases in our Courts nationwide, and therefore, the

constitutionality of the use of these affidavits is an incredibly important issue affecting the administration of justice in this nation. The inevitable split of authority is already emerging, as was recognized by the Maine Supreme Court in its opinion, and this split promises to grow until this Court addresses the issue. It could do so at this early juncture, with this case.

I. The Maine Supreme Court's Decision is at Odds With Other Courts' Treatment of This Issue and it is Plain That an Irreconcilable Conflict is Developing Amongst State and Federal Courts.

The split on the admissibility of motor vehicle affidavits, or similar documents, emerged after *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). This was inevitable, given that *Crawford* stated, "we leave for another day any effort to spell out a comprehensive definition of 'testimonial'." *Id.* at 68. In the wake of that seminal decision, courts that considered these types of affidavits, tended to find them nontestimonial. *See State v. Kronich*, 161 P.3d 982, 986-87 (Wash. 2007)(certified document stating that a defendant's license was suspended did not violate the Confrontation Clause); *State v. Tayman*, 960 A.2d 1151, 1158 (Me. 2008)(Secretary of State's affidavit prepared for use at trial admissible because it serves only to confirm the authenticity of the

underlying motor vehicle records which themselves contain only routine nontestimonial information); *Jasper v. Commonwealth*, 644 S.E.2d 406, 410-11 (Va. 2007)(certification of DMV transcript does not violate *Crawford* because it is prepared in nonadversarial setting and merely summarizes documents that are themselves not prepared in anticipation of litigation); *United States v. Weiland*, 420 F.3d 1062, 1077 (9th Cir. 2005)(holding that a certification of the Secretary of State is nontestimonial), *cert. denied*, 547 U.S. 1114 (2006); *United States v. Bahena-Cardenas*, 411 F.3d 1067, 1075 (9th. Cir. 2005)(which held that a warrant of deportation is nontestimonial because it is simply a routine, objective, cataloging of an unambiguous factual matter), *cert. denied*, 547 U.S. 1056 (2006).

However, when the challenged evidence clearly crossed the line from authenticating documents, to interpreting them, the Court of Appeals of New York found that an affidavit attesting that, on the official's "information and belief" ordinary mailing procedures had been followed in the defendant's case violated the Confrontation Clause. *People v. Pacer*, 847 N.E.2d 1149, 1151-52 (N.Y. 2006).

One point made clear in the post-*Crawford*, but pre-*Melendez-Diaz* cases, was that Courts had tended to allow admission, generally using some version of the logic cited by the Maine Supreme Court in *Tayman*:

> we agree with the reasoning of the majority of jurisdictions that

> have considered this issue and concluded that the introduction of records similar to the Violations Bureau docket entries offered against Tayman are akin to business or public records, and that such documents merely reflect the routine cataloging of administrative events.

Tayman, 960 A.2d at 1158.

Massachusetts v. Melendez-Diaz, 129 S.Ct. 2527 (2009) specifically dealt with the use of affidavits as formalized testimonial materials, which are used so prevalently by the government in a range of prosecutorial arenas, and drew the line higher and more distinctly in favor of extending confrontation clause protections.

Since *Melendez-Diaz*, at least two State courts have adopted the reasoning of that opinion and applied it to hold that affidavits, prepared for use in litigation, and which summarize or interpret government records, violate the Confrontation Clause. The first application was *Tabaka v. District of Columbia*, 976 A.2d 173, 175 (D.C. 2009) which held that a certificate from a motor vehicles official which certified to the absence of any records, ("certificate of nonexistence of record" or "CNR") indicating that the defendant was issued an operator's permit, was testimonial and violated the defendant's right to confrontation.

In *Washington v. Florida*, 18 So.3d 1221, 1224 (Fla. Dist. Ct. App. 2009) a similar certificate, stating a search had been conducted and the defendant did not have a contractor's license, was held to be: (1) accusatory; (2) "introduced to establish an element of the crime"; (3) "prepared at the request of law enforcement as part of its investigation"; and (4) "evaluative in the sense that it represent[ed] not simply the production of an existing record, but an assertion regarding the results of an individual's search of a database or databases." The Court found on those four basis that the affidavit, when used to convict him of acting as an unlicensed contractor during a state of emergency, violated the defendant's right to confrontation. *Id.* at 1224.

Further, three federal courts of appeals – the Second, Fifth and Ninth circuits – have concluded that *Melendez-Diaz* required them to overturn earlier precedents and find that CNR's introduced in immigration cases violate the Confrontation Clause. The pertinent decision from the Second Circuit is *United States v. Madarikan*, No. 08-5589-cr, 2009 WL 4826912 (2d Cir. Dec. 16, 2009) (unpublished) (CNR introduced in prosecution for violation of 8 U.S.C. §1326, illegal reentry after deportation, violated the Confrontation Clause), in the Fifth Circuit, *United States v. Martinez-Rios*, 595 F.3d 581 (5th Cir. 2010)(admission of CNR which indicated that defendant had not received consent to reenter violated defendant's Sixth Amendment rights, overruling *United States v. Rueda-Rivera*, 396

F.3d 678 (5th Cir. 2005)) and, most recently, in the Ninth Circuit, *United States v. Orozco-Acosta*, 2010 WL 2293281 (9th Cir.(Cal.))(holding that reasoning of Melendez-Diaz is clearly applicable to the CNR).

These decisions directly conflict with the Maine Supreme Court holding in this case, and the pre-*Melendez-Diaz* decisions of the Supreme Courts of Washington , *State v. Kronich*, 161 P.3d 982, 986-87 (Wash. 2007), and Virginia, *Jasper v. Commonwealth*, 644 S.E.2d 406, 410-11 (Va. 2007), that a certificate prepared for use in the prosecution of a defendant, which authenticated and summarized motor vehicle records did not violate the Confrontation Clause. The Maine Supreme Court explicitly acknowledged the developing split of authority in footnote 7 of its opinion (App.14). Further, the Court candidly recognized that *Melendez-Diaz* may well have required them to reach the opposite conclusion, stating; "read expansively, *Melendez-Diaz* might be construed as requiring us to conclude that this portion of the certificate is testimonial." (App. 16).

The various Court's treatment of the type of affidavits at issue in *State v. Murphy* hinges on whether they were prepared for use in prosecution, and, if so, whether they merely authenticate underlying records, which are produced at the same time, in which case they are admissible, or whether they interpret, or add to those records, rendering them inadmissible. It is possible to draw a bright line over affidavits that merely authenticate,

and which are always held to be admissible as authentication of business records, and those that interpret and or summarize, as were recognized as inadmissible in obiter dictum in *Melendez-Diaz*. The split is highlighted by two court's different use of the following portion of *Melendez-Diaz*:

> the cases in which the prosecution sought to admit into evidence a clerk's certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it. Like the testimony of the analysts in this case, the clerk's statement would serve as substantive evidence against the defendant whose guilt depended on the nonexistence of the record for which the clerk searched. Although the clerk's certificate would qualify as an official record under respondent's definition – it was prepared by a public officer in the regular course of his official duties – and although the clerk was certainly not a "conventional witness" under the dissent's approach, the clerk was nonetheless subject to confrontation. (citing *People v. Bromwich*, 200 N.Y. 385, 93 N.E. 933, 934 (1911); *People v. Goodrode*, 132 Mich. 542, 94 N.W. 14, 16 (1903).

Melendez-Diaz, 129 S.Ct. at 2539.

This passage was treated by the Maine Supreme Court as follows: "to the extent that the majority opinion discussed clerk's certificates regarding public records, it is "obiter dictum [that] ... is not entitled to be given authoritative precedential value." (App. 16; citing *In re O'Donnell's Express*, 260 A.2d 539, 544 (Me. 1970)).

This very same passage from *Melendez-Diaz* was interpreted to be far more authoritative by the Fifth Circuit; "though not strictly necessary for the disposition in *Melendez-Diaz*, the discussion of clerks' certificates is highly suggestive that . . . . is no longer good law." *United States v. Martinez-Rios*, 595 F.3d 581, 586 (5th Cir. 2010).

This case presents an affidavit which clearly interpreted and summarized, in addition to authenticating, the driving record of defendant.[5] The Maine Supreme Court discussed this case in light of *Melendez-Diaz* and decided that such an affidavit interpreting or summarizing motor vehicle records ("because neutral, bureaucratic information from routinely maintained public records is not obtained by use of specialized

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[5] The affidavit purported to authenticate the defendant's driving record, stating: "I further certify that the attached copy is a true copy of Morris D. Murphy's driving record as maintained by the Secretary of State, as of this date." However, no driving record was attached or admitted into evidence.

methodology, there is little, if any, practical benefit to applying the crucible of cross-examination against those who maintain the information.") was fundamentally different from an affidavit interpreting or summarizing forensic analysis ("such methodology involves "the exercise of judgment and presents a risk of error that might be explored on cross-examination." (App.18-19).

The affidavit in this case squarely present this issue, the conflict is well-defined, in need of clarification and therefore ripe for consideration by this Court.

II. The Question Presented Significantly Impacts the Administration of Thousands of Cases Every Day in the Criminal Justice System.

There can be no serious doubt that, based strictly upon the volume of prosecutions affected, this case presents an issue of great national importance. Just within the arena of operating a vehicle with a suspended license, there are thousands of cases prosecuted every day in the United States.[6] Obviously, when

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[6] While locating statistics for the number of operating without a license or similar types of convictions obtained in the U.S. annually is difficult, some statistical analysis can be gleaned from a study conducted by the Brookings Institute in 2005. Margy Waller, Jennifer Doleac & Ilsa Flanagan, Driver's License Suspension Policies, Brookings Institute, June, 2005. From the study, of the over three million drivers in Colorado from July 1, 2003, through June 30, 2004, there were 264,640, driver's license suspensions, of that

factoring in tax cases, immigration cases, unregistered firearm and illegal carry handgun cases, sex offender registration, unlicensed contractor, and other license and permit cases, the number of convictions obtained which routinely rely upon clerk's affidavits summarizing and interpreting the underlying records is staggering. On this basis alone, this Court should not allow this conflict over the use of clerk's affidavits, that do anything more than authenticate nontestimonial records, to persist and develop.

Clerk's affidavits play a central evidentiary roll in a large number of criminal trials in license and permit cases.

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number, 42,988, drivers alone were cited for driving without insurance. In Iowa, of the over two million drivers there were 37,018, license suspensions in the last quarter of 2004, during this one quarter, there were 4,996, suspensions handed out for driving with a suspended license. In Kentucky, of the 2,839,632, licensed drivers in 2004, there were 150,308, driver's license suspensions and revocations, this included 15,215, suspensions for driving with a suspended license. In Wisconsin, of the 3.8 million licensed drivers at the end of 2002, there were 411,617, license suspensions. Of these, 15,681, were for driving with a suspended license. In Texas, of the nearly 16 million drivers in 2004, there were over 408,670, driver's license suspensions. Of these, 2,820, were for driving with a suspended license. Thus, in just a portion of one year, in only 5 of our 50 states, representing a small fraction of the nation's population, there were over 85,000 prosecutions for driving with a suspended license, or without insurance. It seems clear that the number of cases of operating without a license, or without insurance, prosecuted annually in this country numbers in the hundreds of thousands.

Prosecutions routinely rely on clerk's affidavits to certify to the absence of a record, or to establish some other element, such as with Murphy, that all of the statutory requirements for conviction of the crime he was accused of had been satisfied. In every case this is allowed to occur, the accused is not afforded an opportunity to confront what is very often the most critical witness against them. In many cases, the name of the accuser is not even known as the affidavits are anonymous, or stamped with a figurehead's name.[7] These affidavits are created for use by the prosecution as a roadmap to conviction. As such, they undermine this Court's Confrontation Clause jurisprudence and offend that right of defendants nationwide each and every day.

In Maine, two statutes within the Motor Vehicle code specifically authorize the admission of an affidavit as prima facie proof an any fact set forth in that affidavit.[8] In

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[7] In Morris Murphy's case, the affidavit was applied the stamped signature of the Maine Secretary of State (App. 25).

[8] 29-A M.R.S.A.§113(3) states, in pertinent part: "notwithstanding any other law or rule of evidence, the certificate of the Secretary of State or a deputy, under seal of the State, must be received in a judicial or administrative proceeding as prima facie evidence of any fact stated in the certificate . . ."
A second statute, 29-A M.R.S.A. §560 states, in pertinent part: "The certificate . . . must be received in any court of law in this State or in any proceeding pursuant to this chapter as prima facie evidence of the issuance, suspension, revocation or restoration of any

every other jurisdiction affidavits are used to admit, and in many cases, interpret records.

The conflicting application of the Confrontation Clause to clerk's affidavits across state and federal districts affects thousands of defendants annually. This Court's consideration of the proper application of the confrontation clause to these formalized documents is necessary to provide guidance to lower courts and to eliminate the disparity in outcomes across the justice system.

III. This Case Presents a Clear Opportunity to Consider the Question Presented.

This case is a clear opportunity for this Court to resolve the split of authority over the question presented. The issue in this case is raised free of any waiver or collateral review issues. This petition requests direct review of the Maine Supreme Court's decision. Petitioner unambiguously objected to the admission of the affidavit through a pre-trial motion in limine, as well as during the trial. (App. 26-27, 32) In both cases objection was raised on Confrontation Clause grounds with citation made to *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). This single issue was raised on appeal to the Maine Supreme Court. The trial court resolved this case on its merits.

Therefore, the confrontation clause issue turns entirely on whether or not the

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driver's license, or the issuance, suspension, annulment or restoration of any motor vehicle."

challenged affidavit is testimonial.[9] For all these reasons this case presents the opportunity to provide guidance to all of the nation's courts as to how clerk's affidavits are to be treated post-*Melendez-Diaz*.

IV. The Decision of the Maine Supreme Court Construed the Holding of *Melendez-Diaz* too Narrowly.

The logical conclusion dictated by *Melendez-Diaz* is that an affidavit prepared for use in a prosecution, which not only authenticates underlying public records, but also reports what the records show, violates the Confrontation Clause. This is so because the clerk's affidavit attesting to "his or her knowledge of what routinely-maintained public records indicate" –which was the Maine Supreme Court's characterization of the challenged affidavit - is fundamentally the same as a clerk's affidavit attesting to the absence of a record – which *Melendez-Diaz* holds unquestionably to be subject to

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[9] In the event that the Maine Supreme Court had sided with Petitioner and found a Confrontation Clause violation, the trial court decision would have been reviewed under a "harmless error" analysis which would place the burden on the State to prove beyond a reasonable doubt that the constitutional violation represented by the admission of the Secretary of State's affidavit did not contribute to the verdict. *State v. Warren*, 1998 ME 136, ¶17, 711 A.2d 851, 857. Given the fact that the jury was instructed that they could "rely on the certificate even in the absence of any other evidence," (App. 35) the State could not meet this burden and the verdict would be overturned.

confrontation. (App.18); *Melendez-Diaz*, 129 S.Ct. at 2539.

The Maine Supreme Court acknowledged that the logical conclusion of *Melendez-Diaz might* dictate an outcome different than the one they reached, stating: "read expansively, *Melendez-Diaz* might be construed as requiring us to conclude that this portion of the certificate is testimonial." (App.16). Instead of reaching a conclusion consistent with that opinion, the Court misconstrued the opinion, and in doing so cited four reasons.

The first reason offered by the Maine Supreme Court for not applying *Melendez-Diaz* to the affidavit is that the discussion of clerk's affidavits in that opinion was "obiter dictum [that] . . . is not entitled to be given authoritative precedential value." (App. 16, *citing In re O'Donnell's Express*, 260 A.2d 539, 544 (Me. 1970)). While the discussion of clerk's affidavits contained in the *Melendez-Diaz* opinion may have been obiter dictum, the holding of the case makes clear that testimonial statements, prepared for use in litigation, warrant a straightforward application of *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

The second reason cited by the Maine Supreme Court for not applying *Melendez-Diaz* to the affidavit is that it was non-testimonial and differed from the chemist's certificates of *Melendez-Diaz* as follows:

> . . . the certificates of the Secretary of State, at issue here . . . . do not involve expert analysis or opinion. Rather, they report neutral information by the public official charged with the custody of that information. The certificates do not contain "testimony of the Secretary of State's personal knowledge that the required notice of suspension was mailed; rather, the certificate attests to his or her knowledge of what routinely-maintained public records indicate.

(App. 17-18).

At various places in the opinion the Court characterizes the Clerk's affidavit statements as attesting to what the records "indicate," as "summarizing" the records, and as "authenticating." (App. 1-23). While the latter affidavit function may well be non-testimonial, both of the former functions are plainly testimonial under the holding of *Melendez-Diaz*. The Maine Supreme Court's own characterization of what the affidavit accomplishes, when viewed in light of this Court's Confrontation Clause jurisprudence, render the affidavit, on its face, testimonial.

Third, the Court attempted to distinguish from *Melendez-Diaz*, by stating, "neither the certificate . . . . . are primarily maintained and employed for purposes of criminal prosecution." (App. 18). In fact, the affidavit (certificate) was prepared for use in prosecution. That point was not even

contested by the State at the appellate level. The primary purpose of the certificate created in this case was to prove the fact of suspension, and that the statutory provision for notice of the suspension had been complied with, both essential elements of the crime charged by the prosecution against Murphy.

Fourth, and finally, the Maine Supreme Court contrasted the affidavit with the chemist's certificate in *Melendez-Diaz* and engaged in an analysis of the "utility" of cross-examination. Indeed, the Court concluded, "there is little, if any, practical benefit to applying the crucible of cross-examination against those who maintain the information." (App. 19); *citing Kentucky v. Stincer*, 482 U.S. 730, 737, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987). The Maine Supreme Court went on to endorse the *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed. 2d 597 (1980), approach, notwithstanding the fact that *Roberts* was overruled by this Court six years ago by *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), stating: "A reliability-based approach to public records is harmonious with both the purpose of the Confrontation Clause right and the modern realities associated with proving the content of routinely maintained motor vehicle records." (App. 21-22). The return-to-*Roberts* approach of the Maine Supreme Court is out of step with this Court's precedents. Any approach that dispenses with the crucible of cross-examination when dealing with affidavits prepared for litigation, and which do anything more than authenticate underlying records, is

in fact not harmonious with either the Confrontation Clause, Our Framer's intent, or this Court's precedent.

The harmonious application of the *Melendez-Diaz* decision to public records has in fact been accomplished by several Courts. *Tabaka v. District of Columbia*, 976 A.2d 173 (D.C. 2009) illustrates the proper application of *Melendez-Diaz* to an affidavit in a motor vehicle case. In *Tabaka*, the Court overturned a pre-*Melendez-Diaz* conviction for operating a vehicle without a permit because the conviction had been obtained through the admission of a D.C. Department of Motor Vehicle affidavit attesting that its records revealed no evidence of an operator's permit having been issued to appellant. The Court noted that the *Melendez-Diaz* Court stated that a Clerk could not "create a record for the sole purpose of providing evidence against a defendant." *Id.* at 175; citing *Melendez-Diaz*, at 2539. Finding that that is exactly what the affidavit had done in its case, the *Tabaka* Court applied *Melendez-Diaz* and overturned the conviction.

Similarly, as mentioned above in Section I, three federal courts of appeals – the Second, Fifth and Ninth circuits – have concluded that *Melendez-Diaz* required them to overturn earlier precedents and find that CNR's introduced in immigration cases violate the Confrontation Clause. Each of these cases, *United States v. Madarikan*, No. 08-5589-cr, 2009 WL 4826912 (2d Cir. Dec. 16, 2009); *United States v. Martinez-Rios*, 595 F.3d 581

(5th Cir. 2010); and *United States v. Orozco-Acosta*, 2010 WL 2293281 (9th Cir.(Cal.) have recognized that whereas pre-*Melendez-Diaz*, most Courts held CNR's to be nontestimonial and admissible as business records, *Melendez-Diaz* had overruled those cases and clarified that these types of formalized documents were, in fact, testimonial and subject to the Confrontation Clause. These holdings all illustrate the proper application of *Melendez-Diaz* to affidavits prepared for use in litigation which do anything more than authenticate an underlying record.

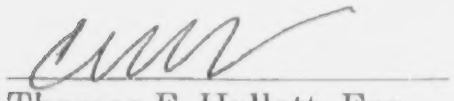
The crux of *Melendez-Diaz* is the same as the Confrontation Clause cases before it, *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. at 2278 (2006) which held statements gathered for "the primary, if not indeed the sole, purpose of . . . . investigat[ing]" a past crime are testimonial and *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), which held that statement obtained by police officers serving an "investigative and prosecutorial function" are testimonial." There can be no serious question that the affidavit admitted against Morris Murphy served an investigative and prosecutorial function. Under this Court's precedents its admission violated the confrontation clause.

There is a split of authority on this critical issue. This Court should confront this issue at this early stage, before it is allowed to grow and affect the rights of thousands of defendants annually.

CONCLUSION

For the reasons set forth above, this petition for writ of certiorari should be granted.

Respectfully submitted,



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APPENDICES

Opinion of the Maine Supreme Judicial Court.....App. 1

Clerk's Certificate for Driving Record.....App. 24

Defendant's Motion in Limine Regarding Certification of the Secretary of State.....App. 26

State of Maine v. Morris Murphy Trial Transcript Exerts.....App. 28

Notice of Suspension and Opportunity for Hearing to Morris Murphy.....App. 38

MAINE SUPREME JUDICIAL COURT
Reporter of Decisions Decision: 2010 ME 28
Docket: Cum-09-240 Argued: January 14, 2010
Decided: March 25, 2010
Panel: ALEXANDER, LEVY, SILVER, MEAD, GORMAN, □ and JABAR, JJ.

STATE OF MAINE

v.

MORRIS D. MURPHY

LEVY, J.

[¶1] Morris D. Murphy appeals from a judgment of conviction of operating while license suspended or revoked (Class E), 29-A M.R.S. § 2412-A(1-A)(D) (2008), entered in the Unified Criminal Docket (Cumberland County, Beaudoin, J.) upon a finding of guilty by a jury. Murphy contends that the trial court violated his Sixth Amendment right to confront witnesses against him by admitting in evidence, over his objection, a written certificate from the Secretary of State as prima facie proof that a notice of his suspension had been sent to him—a necessary element for conviction. Based on the United States Supreme Court's recent decision in Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009), Murphy

□

Although not available at oral argument, Justice Gorman participated in this opinion. See M.R. App. P. 12(a) ("A qualified justice may participate in a decision even though not present at oral argument.").

2 argues that the Confrontation Clause barred

the admission of the certificate because it was testimonial hearsay. We disagree and affirm the judgment.

I. BACKGROUND [¶2] We review the evidence presented at trial in the light most favorable to the State. See State v. Bouchard, 2005 ME 106, ¶ 10, 881 A.2d 1130, 1134.

[¶3] On October 15, 2008, Officer Christopher Woodcock, a police officer with the Cumberland Police Department, observed a vehicle stop at a road that intersects Route 100 in Gray. Believing that he had pulled the same driver over days earlier for operating after suspension, Officer Woodcock turned his vehicle around and increased his speed in an attempt to view the vehicle's license plate number. He soon regained visual contact with the vehicle and eventually came upon it, with Murphy still inside, parked in a driveway. After running the car's license plate, Officer Woodcock confirmed that Murphy's license was suspended. He made contact with Murphy and obtained his license, registration, and insurance information.

[¶4] Murphy was charged with, and pleaded not guilty to, operating while license suspended or revoked (Class E), 29-A M.R.S. § 2412-A(1-A)(D),1 and

1

Title 29-A M.R.S. § 2412-A(1-A) (2008) has since been amended. P.L. 2009, ch. 297 § 1 (effective Sept. 12, 2009) (codified at 29-A M.R.S. § 2412-A(1-A) (2009)). Title 29-A M.R.S. § 2412-A(1-A) states in relevant part: unlawful use of a license (Class E), 29-A

M.R.S. § 2102(1) (2009). Before trial, Murphy moved in limine to exclude from evidence a certificate issued by the Secretary of State, asserting that the admission of the certificate would violate his Sixth Amendment right to confront witnesses.2 The court denied Murphy's motion.

1-A. Offense; penalty. A person commits operating while license suspended or revoked if that person:

A. Operates a motor vehicle on a public way or in a parking area when that person's license has been suspended or revoked, and that person:

(1) Has received written notice of a suspension or revocation from the Secretary of State or a court;

(2) Has been orally informed of the suspension or revocation by a law enforcement officer or a court;

(3) Has actual knowledge of the suspension or revocation;

(4) Has been sent written notice in accordance with section 2482 or former Title 29, section 2241, subsection 4; or

(5) Has failed to answer or to appear in court pursuant to a notice or order specified in section 2605 or 2608.

. . . .

D. Violates paragraph A, the suspension was not for OUI or an OUI offense and the person has one or more prior convictions for violating this section.

Except as otherwise provided, operating while license suspended or revoked is a Class E crime, which is a strict liability crime as defined in Title 17-A, section 34, subsection 4 A.

The certification document, commonly referred to as the "blue seal document," stated:

I, the Secretary of State, of the State of Maine, certify that

the office of the Secretary of State is the legal repository of the Great Seal of the State of Maine and also custodian of the records relating to the revocation, restoration and

[¶5] At trial, the State and Murphy stipulated that Murphy's license was suspended on October 15, 2008, when Officer Woodcock pulled him over. The State's case consisted of Officer Woodcock's testimony and three exhibits that were admitted in evidence: (1) Murphy's driver's license, which was admitted without objection; (2) the certificate from the Secretary of State; and (3) a copy of the letter from the Bureau of Motor Vehicles that notified Murphy of his suspension and the opportunity for a hearing. Over Murphy's renewed objection, the court admitted in evidence the certificate and the copy of the suspension notification letter. The certificate stated, among other things, that according to the Secretary of State's records regarding operators' licenses and registrations, "[n]otice of suspension was sent [to Murphy] by regular mail, no later than

suspension of operators' licenses and registrations, and that the paper to which this

is attached is a true copy from the records of this office.

I further certify that, according to our records the license or right to operate of

Morris D. Murphy, whose date of birth is July 9, 1958, was suspended effective September 15, 2008 by the Secretary of State

Notice of suspension was sent by regular mail, no later than September 5, 2008 in accordance with the provisions of 29-A MRSA Section 2482 (1).

Morris D. Murphy's right to operate was under suspension on October 15, 2008 because the statutory conditions for restoration had not been satisfied.

I further certify that the attached copy is a true copy of Morris D. Murphy's driving record as maintained by the Secretary of State, as of this date.

Although the last paragraph in the certificate referred to an attached copy of Murphy's driving record, no other document was attached to the certificate. However, a third exhibit, a copy of the letter entitled "Notice of Suspension and Opportunity for Hearing" was also admitted in evidence over Murphy's objection.

September 5, 2008 in accordance with the provisions of 29-A MRSA Section 2482 (1)." The copy of the suspension notification letter established the same fact.

[¶6] The jury found Murphy guilty of both counts. On the count of operating while license suspended or revoked, he was sentenced to forty eight hours in the county jail and a $500

fine, and on the count of unlawful use of a license, a twenty-four-hour concurrent jail sentence was imposed. This appeal followed.

II. DISCUSSION

[¶7] On two previous occasions we have held that the admission of a sworn certificate by the Secretary of State as prima facie proof that an operator had been sent written notice of the suspension or revocation of his or her right to operate does not violate the Confrontation Clause of the Sixth Amendment. See State v. Tayman, 2008 ME 177, ¶ 24, 960 A.2d 1151, 1158; see also State v. Morin, 598 A.2d 170, 172 (Me. 1991). Murphy contends that admission of the certificate violated his Sixth Amendment rights because it was testimonial hearsay and that he did not have an opportunity to cross-examine the Secretary of State. He urges us to conclude that our prior decisions, which involved the admission of certificates nearly identical to the one at issue in this case, have been effectively overruled by the United States Supreme Court's recent decision in Melendez-Diaz, 129 S. Ct. 2527. In Melendez-Diaz, the Court's majority held that certificates from the state's chemists reporting that substances found on a defendant were determined, after laboratory analysis, to be cocaine, were a form of testimony that triggered the defendant's constitutional right of confrontation. Id. at 2530, 2542. The State responds that our earlier decisions remain binding precedent because "[t]the maintenance of driving records does not entail the exercise of judgment and risks of error that take place

in a laboratory test."

[¶8] We proceed by (A) reviewing recent developments in Confrontation Clause principles applicable to this case; (B) considering whether our decisions in Tayman and Morin retain their vitality after the Supreme Court's decision in Melendez-Diaz; and (C) concluding that Murphy's Sixth Amendment rights were not violated.

A. Confrontation Clause

[¶9] The Sixth Amendment's Confrontation Clause, which is applied to states through the Fourteenth Amendment, Pointer v. Texas, 380 U.S. 400, 403 (1965), provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. In Ohio v. Roberts, the Supreme Court held that the Confrontation Clause is not violated by hearsay evidence that bears adequate "indicia of reliability." 448 U.S. 56, 66 (1980) (quotation marks omitted). The Court concluded in Roberts that the transcribed testimony of a witness from a preliminary hearing was admissible at the trial where the witness was unavailable and the defendant had had the opportunity to cross-examine the witness at the preliminary hearing. Id. at 58, 73.

[¶10] After Roberts, we considered whether the Confrontation Clause prohibited the State from establishing that a defendant had been sent notice that his license or right to operate had been suspended by admitting a certificate of the Secretary of State, which summarized

the content of records, and a copy of the suspension notification letter. Morin, 598 A.2d at 172. The defendant in Morin did "not suggest that the Secretary of State or a deputy must testify at every trial; he argu[ed], however, that the confrontation clause requires at a minimum that certified copies of the actual records, rather than a certificate summarizing the contents of the records, be offered." Id. at 172. Applying the reliability standard articulated in Roberts, we concluded that the certificate and the letter at issue were "inherently trustworthy as a data compilation of a public agency setting forth its regularly conducted and recorded activity" and, thus, their admission did not offend the Confrontation Clause. Id. (quotation marks omitted).

[¶11] More recently in Crawford v. Washington, the Supreme Court reconsidered the notion that the reliability of hearsay evidence may be sufficient to protect a defendant's Confrontation Clause rights. 541 U.S. 36 (2004). There, the Court held that the admission of a tape-recorded statement made to police by a woman whose husband had stabbed a man violated the husband's Confrontation Clause rights. Id. at 68-69. The Court explained that the underlying purpose of the Confrontation Clause is to prevent the use of ex parte testimonial statements as evidence against the accused, and that the Confrontation Clause bars the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior

opportunity for cross-examination." Id. at 53-54. The Confrontation Clause was thus deemed to guarantee the opportunity for cross-examination as the procedural mechanism for testing the reliability of evidence:

> To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.

Id. at 61; see also State v. Gorman, 2004 ME 90, ¶ 46, 854 A.2d 1164, 1175 (recognizing "that statements admissible under an exception to the hearsay rule may be inadmissible when tested against the Confrontation Clause . . . because Confrontation Clause analysis differs from hearsay rule analysis").

[¶12] Crawford treated "testimony" as being "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." 541 U.S. at 51 (quotation marks omitted). Several types of testimonial statements subject to the right of confrontation were identified:

> 9 Various formulations of this core class of testimonial statements exist: [(1)] ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used

prosecutorially[;] . . . [(2)] extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions[;] . . . [and (3)] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. Id. at 51-52 (quotation marks omitted).

[¶13] We considered and applied Crawford in the context of a prosecution for operating after a defendant's license was suspended in Tayman, 2008 ME 177, ¶ 1, 960 A.2d at 1152. The trial court in that case had admitted two exhibits in evidence: (1) a record of docket entries from the Violations Bureau that was attested to by the clerk of the Bureau; and (2) a certificate from the Secretary of State, nearly identical to the one in this case.3 Id. ¶ 3, 960 A.2d at 1153. After considering Crawford, we concluded that the defendant's Confrontation Clause rights were not violated with regard to the Violations Bureau docket entries because such documents "are akin to business or public records, and . . . merely reflect the routine cataloging of administrative events." Id. ¶ 21, 960 A.2d at 1157.

3

The notice of suspension in the certification stated: "[N]otice of suspension was sent by regular mail to Richard E. Tayman, Jr.. . . . by the Violations Bureau of the District Court, pursuant to 29-A MRSA Section 2608." State v. Tayman, 2008 ME 177, ¶ 3, 960 A.2d 1151, 1153 (quotation marks omitted).

10 Our opinion explained that the "docket entries at issue here represent the mere contemporaneous documentation of regular business activity within the Violations Bureau and do not contain assertions or accusations made after the fact and in preparation for litigation."4 Id. "To require live testimony regarding the ministerial acts at issue in this instance would not serve to promote the fundamental constitutional protections identified in Crawford."5 Id. ¶ 22, 960 A.2d at 1158.

[¶14] We also found no constitutional defect with the trial court's admission of the Secretary of State's certificate, observing that it "serves only to confirm the authenticity of the underlying records of the Bureau, which themselves contain only routine, nontestimonial information." Id. ¶ 24, 960 A.2d at 1158. Consequently, we found nothing in the admission of the certificate that offended Crawford.6 Id. ¶ 25, 960 A.2d at 1158.

[¶15] More recently in Melendez-Diaz, the Supreme Court applied the new Crawford standard to a drug prosecution in which the defendant asserted that his

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See also State v. Knight, 2009 ME 32, ¶¶ 4, 10, 967 A.2d 723, 724, 725 (holding that the admission in evidence of a certifying document from the Secretary of State "that its history records indicated that notice of suspension was sent by regular mail" to the defendant did not violate the Confrontation Clause).

5

Cf. State v. Francis, 610 A.2d 743, 745 (Me. 1992) (concluding that admission of hospital records in evidence against the defendant did not violate his right to confront witnesses because "[t]reating physicians have every reason to be truthful, accurate, and complete when preparing hospital records").

6

Because the defendant in Tayman did not object to the admission of the certificate at trial, our opinion applied an obvious error standard of review. Tayman, 2008 ME 177, ¶ 23, 960 A.2d at 1158.

right of confrontation was violated by the admission of the government's chemists' certificates reporting that their forensic analysis identified seized substances as cocaine. 129 S. Ct. at 2530, 2542. The Court's majority observed that the certificates were "functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination." Id. at 2532 (quotation marks omitted). Further, the certificates "certainly provided testimony against petitioner, proving one fact necessary for his conviction—that the substance he possessed was cocaine." Id. at 2533.

[¶16] In response to the government's claim in Melendez-Diaz that the certificates represented "neutral scientific testing," thereby avoiding Confrontation Clause problems, the majority reasoned that affording the accused the right to directly confront the chemists would have beneficial effects: (1)

ensuring accurate forensic analysis by deterring fraudulent analysis; (2) "weed[ing] out" incompetent analysis; and (3) providing defendants with an opportunity to explore the analysts' methodologies. Id. at 2536-37 (quotation marks omitted). The majority concluded that there was "little reason to believe that confrontation will be useless in testing analysts' honesty, proficiency, and methodology." Id. at 2538.

[¶17] The majority opinion also rejected the claim made in the dissenting opinion, joined by four justices, that the forensic analysts' certificates were akin to a clerk's certificate authenticating an official record. Id. at 2538-39. The majority 12 characterized the parameters of a clerk's traditional authority to issue a certificate authenticating records as not including the authority to express the clerk's interpretation of the records themselves. Id. at 2539.

B. The Vitality of Tayman After Melendez-Diaz

[¶18] Although Crawford described the types of statements that are generally considered testimonial, the Court left "for another day . . . to spell out a comprehensive definition of testimonial." 541 U.S. at 68 (quotation marks omitted). The Court acknowledged that in refusing to clearly define testimonial, "interim uncertainty" would exist regarding the distinction between testimonial and nontestimonial evidence. Id. at 68 n.10. Crawford did not resolve the issue of whether public records offered against a defendant at

trial implicate the defendant's Confrontation Clause rights. See Crawford, 541 U.S. at 76 (Rehnquist, C.J., dissenting in part, but concurring in the judgment) ("To its credit, the Court's analysis of 'testimony' excludes at least some hearsay exceptions, such as business records and official records."). The question thus presented is whether the Court's decision in Melendez-Diaz refines the definition of what is testimonial to encompass public records, such as those admitted in evidence at Murphy's trial.7

7

Two courts have adopted the reasoning of Melendez-Diaz and held that certificates attesting to the fact that a government official searched particular records and failed to find either a permit or license were testimonial and violated a defendant's right to confrontation. See Tabaka v. District of Columbia, 976 A.2d 173, 175 (D.C. 2009) (holding that a certificate from a motor vehicles official, which certified to the absence of any records indicating that appellant was issued an operator's permit, was testimonial);

[¶19] Read expansively, Melendez-Diaz might be interpreted as extending the definition of testimony beyond sworn certificates addressing scientific analysis prepared for purposes of a criminal prosecution, to include sworn certificates that authenticate and summarize routine governmental records. The opinion contains conflicting signals on this point. The Court's majority recognized that, by their nature, business and public records are

not testimonial:

> Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial.

Melendez-Diaz, 129 S. Ct. at 2539-40; see also Crawford, 541 U.S. at 56 ("Most of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy."). The Court's majority in Melendez-Diaz also suggested, however, that the information that may be set forth in a clerk's certificate is quite restricted:

see also Washington v. Florida, 18 So. 3d 1221, 1224 (Fla. Dist. Ct. App. 2009) (stating that the certificate was: (1) accusatory; (2) "introduced to establish an element of the crime"; (3) "prepared at the request of law enforcement as part of its investigation"; and (4) "evaluative in the sense that it represent[ed] not simply the production of an existing record, but an assertion regarding the results of an individual's search of a database or databases"). Another court has held that a defendant's right to confrontation was not violated at the punishment stage of trial when an exhibit was admitted in evidence that contained a "department of corrections social and criminal history [evaluation of the defendant] prepared by an unnamed department employee." Grey v. Texas, 299

S.W.3d 902, 906, 910 (Tex. App. 2009). The court concluded that the "criminal history summary, not having been made in anticipation of prosecutorial use, was not testimonial." Id. at 910.

14

He was permitted to certify to the correctness of a copy of a record kept in his office, but had no authority to furnish, as evidence for the trial of a lawsuit, his interpretation of what the record contains or shows, or to certify to its substance or effect. 129 S. Ct. at 2539 (quotation marks omitted).8 Here, the Secretary of State's certificate attests to the authenticity of underlying public records, but also reports what the records show—that the required notification of suspension was sent to Murphy. Read expansively, Melendez-Diaz might be construed as requiring us to conclude that this portion of the certificate is testimonial.9 For several reasons, we are not persuaded to embrace that construction.

[¶20] First, the application of the Confrontation Clause to certificates like the one at issue in this case was neither raised by the facts nor presented for decision in Melendez-Diaz. Therefore, to the extent that the majority opinion discussed clerks' certificates regarding public records, it is "obiter dictum [that] . . . is not entitled to be given authoritative precedential value." In re O'Donnell's Express, 260 A.2d 539, 544 (Me. 1970) (quotation marks omitted). "[G]eneral

8

See generally G. Michael Fenner, Today's

Confrontation Clause (After Crawford and Melendez-Diaz), 43 Creighton L. Rev. 35, 61 (2009) ("There are lots of business records that are specifically prepared to be used in criminal trials—to 'testify' against the accused in the event there is a criminal trial.").

9

Within the context of Murphy's appeal, an expansive reading of Melendez-Diaz would precipitate a harmless error analysis. See State v. Warren, 1998 ME 136, ¶ 17, 711 A.2d 851, 857 ("When a trial error is of constitutional magnitude, the appropriate harmless error inquiry is whether, after a review of the whole record, we are satisfied beyond a reasonable doubt that the error did not contribute to the verdict obtained.").

Expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision." Humphrey's Ex'r v. United States, 295 U.S. 602, 627 (1935) (quotation marks omitted).

[¶21] Second, the reasoning employed in Melendez-Diaz, which resulted in the holding that the chemists' certificates were testimonial, does not apply here. The chemists' certificates were substituted for live, in-court expert testimony prepared in an effort to secure the defendant's criminal conviction. In contrast, the certificates of the Secretary of State, at issue here and considered in Morin and Tayman, do not involve expert analysis or

opinion. Rather, they report neutral information by the public official charged with the custody of that information. The certificates do not contain "testimony" of the Secretary of State's personal knowledge that the required notice of suspension was mailed; rather, the certificate attests to his or her knowledge of what routinely-maintained public records indicate. This distinction is important because the certificate communicates no facts or information beyond that which is established by the notice of suspension letter.

[¶22] Third, neither the certificate nor the records to which it refers are primarily maintained and employed for purposes of criminal prosecution. Identical certificates are routinely prepared for nonprosecutorial purposes, such as administrative motor vehicle proceedings and insurance-related inquiries.

[¶23] Finally, in determining the reach of the Melendez-Diaz holding, we must also account for the procedural protection that the Court recognized as inherent in the right of confrontation. The majority opinion emphasized the importance of having the procedural right of confrontation attach to an issue as substantive as the methodology a chemist employs to analyze a chemical compound. Such methodology involves "the exercise of judgment and presents a risk of error that might be explored on cross-examination." Melendez-Diaz, 129 S. Ct. at 2537. Thus, the value of allowing cross examination on this topic is essential to

> assuring justice not for its own sake, but because of its functional, truth-seeking value. Cross-examination guarantees that the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.
>
> Mattox v. United States, 156 U.S. 237, 242-43 (1895).

[¶24] Cross-examination has far less utility with respect to the information contained in the certificate at issue here. The Bureau's collection and maintenance of motor vehicle license-related information are largely automated, and the data collected are not subject to any serious interpretation, judgment, or analysis. Our constitutional analysis should not ignore the context in which these records are produced. Because neutral, bureaucratic information from routinely maintained public records is not obtained by use of specialized methodology, there is little, if any, practical benefit to applying the crucible of cross-examination against those who maintain the information. See Kentucky v. Stincer, 482 U.S. 730, 737 (1987) ("The right to cross-examination, protected by the Confrontation Clause, thus is essentially a 'functional' right designed to

promote reliability in the truth-finding functions of a criminal trial.").

[¶25] Although Crawford overruled Ohio v. Roberts, both state10 and federal11 courts have not completely discarded reliability as a factor when

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See Arizona v. King, 146 P.3d 1274, 1280 (Ariz. Ct. App. 2006) (holding that driving records were nontestimonial); see also People v. Saffold, 26 Cal. Rptr. 3d 190, 193 (Cal. Ct. App. 2005) (concluding that proof of service of a domestic relations restraining order was nontestimonial); Colorado v. Shreck, 107 P.3d 1048, 1060-61 (Colo. Ct. App. 2004) (determining that documentary evidence showing prior convictions and affidavits used to establish chain of custody for certain documents were nontestimonial); Iowa v. Shipley, 757 N.W.2d 228, 237-38 (Iowa 2008) (holding that a certified abstract of a defendant's driving record was nontestimonial); Kansas v. Dukes, 174 P.3d 914, 917-18 (Kan. Ct. App. 2008) (holding that the introduction of driving records without a witness did not violate a defendant's right to confrontation); Jasper v. Virginia, 644 S.E.2d 406, 410-11 (Va. Ct. App. 2007) (holding that the DMV transcript used to prove revocation and notice was nontestimonial); Washington v. Kronich, 161 P.3d 982, 986-87 (Wash. 2007) (holding that the admission of a certified document stating that defendant's license was suspended was nontestimonial); Washington v. Kirkpatrick, 161 P.3d 990, 996-97 (Wash.

2007) (holding that a certified letter verifying that a defendant did not have a valid driver's license was nontestimonial and that "Washington courts have long recognized the inherent reliability and admissibility of driving records").

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See United States v. Garcia, 452 F.3d 36, 41-42 (1st Cir. 2006) (concluding that warrants of deportation were nontestimonial hearsay); see also United States v. Ballesteros-Selinger, 454 F.3d 973, 975 (9th Cir. 2006) (holding that a memorandum of oral decision issued by an immigration judge at a deportation hearing was nontestimonial); United States v. Valdez-Maltos, 443 F.3d 910, 911 (5th Cir. 2006) (per curiam) (concluding that warrants of deportation were nontestimonial), cert. denied, 549 U.S. 916 (2006); United States v. Cantellano, 430 F.3d 1142, 1145 (11th Cir. 2005) (concluding that warrants of deportation were nontestimonial), cert. denied, 547 U.S. 1034 (2006); United States v. Weiland, 420

determining whether public records, such as those admitted in this case, are testimonial. Melendez-Diaz did not disaffirm applying such a rationale in connection with public records. It is our reasoned judgment that reliability should not be ignored when determining whether public records should be treated as testimonial. A reliability-based approach to public records is harmonious with both the purpose of the Confrontation Clause right and the modern realities associated with proving the content of routinely maintained motor

vehicle records.

C. Conclusion

[¶26] We thus conclude that our decision in Tayman remains valid precedent and should control our decision in this case. As in Tayman, the Secretary of State's certificate authenticated and summarized routine motor vehicle records that were not primarily maintained for use as evidence in criminal prosecutions. Further, the certificate was accompanied by an actual record that corroborated the summary contained in the certificate. Under these circumstances, Murphy's rights secured by the Confrontation Clause of the Sixth Amendment were not violated.

F.3d 1062, 1077 (9th Cir. 2005) (concluding that records of prior convictions were nontestimonial), cert. denied, 547 U.S. 1114 (2006); United States v. Bahena-Cardenas, 411 F.3d 1067, 1075 (9th Cir. 2005) ("We conclude that the warrant of deportation is nontestimonial because it was not made in anticipation of litigation, and because it is simply a routine, objective, cataloging of an unambiguous factual matter."), cert. denied, 547 U.S. 1056 (2006).

The entry is:

Judgment affirmed.

Attorney for Morris Murphy:

David A. Weyrens, Esq. (orally) The Hallett Law Firm 75 Market Street, Suite 502 PO Box 7508 Portland, Maine 04112

Attorneys for the State of Maine:
Stephanie Anderson, District Attorney
Jonathan R. Liberman, Student Intern (orally)
Jennifer Norbert, Asst. Dist. Atty.
Prosecutorial District No. Two 142 Federal Street Portland, Maine 04101
Cumberland County Unified Criminal Docket docket number CR-2008-2775
FOR CLERK REFERENCE ONLY

STATE OF MAINE
DEPARTMENT OF STATE

I, the Secretary of State, of the State of Maine, certify that

The office of the Secretary of State is the legal repository of the Great Seal of the State of Maine and also custodian of the records relating to the revocation, restoration and suspension of operators' licenses and registrations, and that the paper to which this is attached is a true copy from the records of this office.

I further certify that, according to our records the license or right to operate of

Morris D. Murphy, whose date of birth is July 9, 1958, was suspended effective September 15, 2008 by the Secretary of State as the result of a conviction for OPERATING AFTER SUSPENSION, pursuant to 29-A MRSA Section 2458 (2)(3).

Notice of suspension was sent by regular mail, no later than September 5, 2008 in accordance with the provisions of 29-A MRSA Section 2482 (1).

Morris D. Murphy's right to operate was under suspension on October 15, 2008 because the statutory conditions for restoration had not been satisfied.

I further certify that the attached copy is a

true copy of Morris D. Murphy's driving record as maintained by the Secretary of State, as of this date.

[State Seal] In Testimony Whereof, I have caused the Great Seal of the State to be hereunto affixed. GIVEN under my hand at Augusta, this Twenty-Second day of October, in the year of our Lord two thousand and Eight. Signed, Secretary of State.

STATE OF MAINE SUPERIOR COURT
CUMBERLAND, SS UNIFIED CRIMINAL DOCKET DOCKET NO. CUMCD-08-2775

STATE OF MAINE,)
)
Plaintiff)
v.)
)
MORRIS MURPHY,)
)
Defendant)

DEFENDANT'S MOTION IN LIMINE REGARDING CERTIFICATION OF THE SECRETARY OF STATE

NOW COMES Defendant Morris Murphy, by and through his attorneys, The Hallett Law Firm, and presents its Motion in Limine to exclude the admission into evidence of the Certificate of the Secretary of State, dated October 22, 2008, absent a proper evidentiary foundation, and as support therefore, states as follows.

Upon information and belief, the State intends to admit the Certificate of the Secretary of State which was created at the request of the arresting officer in this matter and sent directly to the District Attorney's office for use in litigation. The Certificate purports to establish when notice of

suspension was physically sent to Mr. Murphy, amongst other things. This Certificate is testimonial in nature and it clearly constitutes hearsay evidence. As such, absent a proper evidentiary foundation, which will require live testimony, the admission of the Certificate would constitute a violation of Mr. Murphy's Sixth Amendment rights under the Confrontation Claus of the United States Constitution and as set forth in Crawford v. Washington, 541 U.S. 36 (2004).

WHEREFORE, Mr. Murphy respectfully requests that this Court exclude the admission into evidence of the Certificate of the Secretary of State, dated October 22, 2008, absent a proper evidentiary foundation, and for such other and further relief as this Court deems appropriate.

Dated this twenty-second day of April, 2009, at Portland, Maine.

Respectfully submitted,

_____

David A. Weyrens, Bar No. 4035

Attorneys for Defendant

STATE OF MAINE SUPERIOR COURT
CUMBERLAND, SS CRIMINAL ACTION

CR-08-2775

STATE OF MAINE

v.

MORRIS MURPHY JURY TRIAL

BEFORE:
HONORABLE ROLAND BEAUDOIN,
SUPERIOR COURT JUSTICE

Cumberland County Courthouse
Portland, Maine
April 22, 2009

APPEARANCES:
For the State: Christine Fucillo, Intern
Jennifer Norbert, A.D.A.
For the Defendant: David Weyrens, Esq.
Diane L. McManus
Official Court Reporter

TRANSCRIPT OF PROCEEDINGS

(The following matter was heard before the Honorable Roland Beaudoin, at the Cumberland County Courthouse, Portland, Maine, on April 22, 2009.)

(The following chambers conference was held at 8:57 a.m.)

THE COURT: This is April 22, 2009, case is State vs. Morris Murphy, Judge Beaudoin presiding. We are scheduled to start a jury

trial in a few minutes. Counsel are here. Defendant's counsel has submitted a written motion in limine regarding certification of the Secretary of State which I have read, and I take it to allege a confrontation clause requirement, excuse me, violation if the certificate of the Secretary of State concerning the notice of suspension is admitted into evidence. Did you have time to prepare anything in writing or response.

MS. FUCILLO: I did not have time to prepare anything in writing. I am aware, I would have to look up the citation for you, of a Maine case that said that a certificate from the Secretary of State is not testimonial in nature, and therefore it does not violate the confrontation clause.

THE COURT: I think I recall there is such a case too, and I don't have the cite at my fingertips, but I can probably get it fairly quickly.

MR. WEYRENS: There is a, Judge, State v. Taiman. For the record Dave Weyrens representing Morris Murphy. In this case, Your Honor, the defense counsel had not objected to the admission of the certificate at trial, and so the court did speak to the issue of the testimonial nature of the certificate. However, in that case it hadn't been objected to, and so on the facts of that case the court said, well, we are not going to get into—

THE COURT: You are saying they didn't rule on the issue?

MR. WEYRENS: I don't think they ruled conclusively on the issue, and I just want to

preserve in this case the issue.

THE COURT: I have my computer here. We are going to go off the record for a second while I quickly search for that case. (A discussion was held off the record.)

THE COURT: We are back on the records, and the clerk came in with some information about one of the jurors in State v. Murphy case. Would you indicate for the records what the message is?

THE CLERK: It's juror No. 75 James Gallagher. When he left the building yesterday he found out his three-year-old had a lump in her chest, and they need to get her in for a CAT scan as soon as possible, so he would like to be excused.

THE COURT: And what is the defense, we do have one alternate for this jury, what are the parties' positions what we should do?

MR. WEYRENS: Seeing where we have an alternate I think he should be excused, sounds like a good reason.

MS. FUCILLO: The state agrees, Your Honor.

THE COURT: Do we know if all the other jurors are here?

A COURT OFFICER: I was missing tow about five minutes ago. I have to go check and make sure.

THE COURT: I would like to wait a couple minutes to make sure we have 12 jurors here before we make a final decision. Can you ask him to wait for a few minutes. We want to make sure all the other jurors are here. I have read the language in the case that you cited.

Although it does say that if there is no objection the issue, the unpreserved, the y go on to in detail explained in my opinion why it's not a violation of the confrontation clause to admit that certificate, and specifically they say here the admission of violation of the bureau docket entries and certification of the Secretary of State without live testimony did not on the record before us violate Taiman's Sixth Amendment confrontation rights, so I think the case can be read more strongly than you are asserting, Mr. Weyrens, so I am going to deny your motion in limine. It is denied.

MR. WEYRENS: Certified we have agreed, Judge.

THE COURT: What have we agreed to?

MR. WEYRENS: We have agreed to redact.

MS. FUCILLO: It's not redacted yet, but it needs to be.

MR. WEYRENS: The language.

(pages 7 through 54 omitted)

A. At that time he was traveling at too high a rate of speed for me to be able to catch up him.

Q. And could you tell us how fast you were going at that time?

A. As I stated when I looked down I was doing 80 miles-per-hour.

Q. And just one last question the person that you saw getting out of the vehicle at No. 5 Forest Lake Road was that the same vehicle that you made eye contact with at Route 100?

A. Yes.

Q. Thank you. May I have one moment Your Honor?

THE COURT: Sure.

MS. FUCILLO: No further questions, Your Honor.

THE COURT: Mr. Weyrens.

MR. WEYRENS: I don't have anything further for Officer Woodcock.

THE COURT: Would counsel please get the exhibit and return it to the clerk. Thank you. And you may step down, sir. Does the State have any other witnesses they are calling?

MS. FUCILLO: No, Your Honor, but at this time the state moves to enter Exhibit 1 and Exhibit 2.

MR. WEYRENS: Your Honor, I am gonna object to the admission of these two exhibits on the basis of the lack of foundation, and I think they need more foundation to be admitted.

THE COURT: For the reasons stated.

MR. WEYRENS: For the reasons stated in the motion in limine.

THE COURT: I am gonna overrule those objections and admit the documents State's Exhibits 1 and 2, and if I could have them for a second. As to Stat's Exhibits 1 and 2 counsel have agreed that I can indicate to you that there is certain language that's whited out and cannot be read because of the whiteout, and that is essentially because it's unnecessary statements for you to consider in resolving the case. Don't draw any inappropriate or negative inference from the fact that there is whiteouts on the sheets. With that does the state have any other evidence to present?

MS. FUCILLO: No, Your Honor, I would ask that the exhibit be published to the jury at this time.

THE COURT: I'm sorry.

MS. FUCILLO: I would ask permission to publish the exhibits to the jury at this time.

THE COURT: Any objection, Mr. Weyrens?

MR. WEYRENS: No, Your Honor.

THE COURT: We will show the three exhibits to the jury. You will also have them for your jury deliberations, but you can take a minute to look at them now. Just hand them to your left as you are done with them. You will get an opportunity as I said to have those documents in detail, take all the time you need when jury deliberations occur. I note for the record that the jury has reviewed three exhibits. Anything else from the state?

MS. FUCILLO: No, Your Honor.

THE COURT: Mr. Weyrens?

MR. WEYRENS: Nothing. Give me one minute, Your Honor. Nothing further, Your Honor.

THE COURT: The defendant rests?

MR. WEYRENS: The defendant does rest.

THE COURT: All right, ladies and gentlemen of the jury, the evidence has been completed. Now I am going to take a recess though to discuss with the attorneys the instructions of law that I will be giving you shortly and also to help them prepare for their closing arguments to you. Please follow the marshals' instructions on how to proceed with your break, and I want to remind you again not to speak to each other or anyone else about what you have heard or what your opinions might be at this point if any because you have not yet heard closing arguments or the instructions of law, and we will return to the courtroom hopefully shortly.

(The jury left the courtroom at 10:32 a.m.)

(The following chambers conference was held at 10:36 a.m.)

THE COURT: I failed to ask you before we went in whether you wanted to take a recess to discuss instructions before you made your closing arguments. I assume that was okay with everybody.

MS. FUCILLO: Yes.

MR. WEYRENS: Yes.

THE COURT: You had some proposals you said you wanted to submit.

MS. FUCILLO: Yes, Your Honor, I have four proposals.

(*Pages 59 through 94 omitted*)

THE COURT: ..has given him notice of the suspension of his driving privileges in accordance with Maine law.

Now Maine law provides that notice of the suspension of a driver's license may be given to that person by delivering written notice of the suspension to him or by a law enforcement officer telling him orally that his license has been suspended or by mailing notice of the suspension to the last name and address the persona gave to the Secretary of State when he applied for or renewed his driver's license. When the Secretary of Sate mails out a notice of suspension it is deemed to have been received by the person unless it is returned by postal authorities. The state is not required to prove that a person had actual knowledge that they were under suspension. Rather the State need only prove that a person had actual knowledge that they

were under suspension. Rather the state need only prove that the defendant had notice by mailing notice of the suspension to the last name and address the person gave to the Secretary of State when he applied for a license or renewal of his license. The state has introduced a certificate of the Secretary of State regarding the license and the status of the person named in the certificate in this case the defendant. This certificate may be accepted by you as sufficient proof of any facts stated in this certificate without the need to offer any further evidence as to the truth of those facts. There fore you may consider the certificate as evidence that the defendant's right to operate was suspended effective, I am making a slight change in the instruction here, September 15, 2008 as stated in the certificate. You may not bound by the information stated in the certificate however. The certificate merely creates an inference of fact which you are free to accept or reject.

Under Maine law operating after suspension is a strict liability crime. A strict liability crime is a crime that as legally defined does not include a culpable mental state with respect to any of the elements of the crime, and thus proof by the state of a culpable mental state as to that crime is not required. A culpable mental state is defined as follows: A person acts culpably when the person acts with the intention, knowledge, recklessness or criminal negligence as required. Again in this case, in this case the state does not have to prove a culpable mental state to prove that the defendant committed the crime alleged in Count II, Count I of the complaint, excuse me.

In Count II of the complaint the state has

charged that on or about October 15, 2008 in Gray, Maine the defendant displayed a revoked, suspended, mutilated, fictitious or fraudulently altered driver's license or identification care issued or represented to be issued by this state or any other state or province. In this case the state must prove beyond a reasonable doubt that on October 15, 2008 in Gray, Maine the defendant displayed a suspended driver's license. Under Maine law this is a strict liability crime also. A strict liability crime again is a crime that is legally defined does not include a culpable mental state with respect to any of the elements of the crime, and thus proof by the state of a culpable mental state of mind as to that crime is not required. A culpable mental state is defined as follows: A person acts culpably when the person acts with intention, knowledge, recklessness or criminal negligence as is required. Again in this case that state does not have to prove a culpable mental state to prove that the defendant committed the crime alleged in Count II of the complaint. There are tow charges in this case. The defendant is charged with two crimes. You must no infer guilty because of the number of charges. Each charge must be considered independently. You may find that the defendant is not guilty of all the charges. You may find that he guilty of all the charges, or you may find that the defendant is not guilty of one of the charges but guilty of one of the charges but guilty of the other change. You may consider the evidence of the instructions separately as to each charge and reach a separate decision as to whether the state has proven each charge beyond a reasonable doubt.

I come now to the last part of the instructions the rules for your deliberations. When you retire to the jury room you will discuss the case with the other jurors. You shall permit your foreperson, and I will identify that person in a moment, to preside over your deliberations, and your foreperson.

STATE OF MAINE
Department of the Secretary of State
Bureau of Motor Vehicles
Court Records Section

Morris D. Murphy
P.O. Box 641
Standish, ME 04084

Print Date: August 30, 2008
Mailed by Date: September 5, 2008
Date of Birth: July 9, 1958
License Number/Class: 2082095/C
Suspension Period: 60 days
Suspension Effective: September 15, 2008

NOTICE OF SUPSENSION AND
OPPORTUNITY FOR HEARING

The Secretary of State* is suspending your driving privileges as of the effective date and for the suspension period referenced above as a result of your conviction of OPERATING AFTER SUSPENION/COURT RECORDS by the Portland District Court, Maine on July 11, 2008. If you have been issued a valid State of Maine drivers license, you are hereby ordered to return your license to this office by the suspension effective date indicated above.

You may request a hearing to show why you should not be suspended.** you may call (207) 624-9000 ext. 52113 to ask for a hearing by telephone, or you may appear on Wednesdays at Bureau of Motor Vehicles, 101 Hospital Street, Augusta, Maine 04333. Hearings are held on a walk-in basis Wednesdays only from 8:30 a.m. to

11:30 a.m., and from 1:00 p.m. to 3:30 p.m. (expect legal holidays).

HOW TO GET YOUR PRIVILEGES BACK

1) Complete and return the enclosed document with a reinstatement fee of $35.00 to Secretary of State.
2) Satisfy any other suspension that may be in effect.

IMPORTANT

You may not drive until you receive written notice that you license or privilege to operate has been restored. The further operation by you of any motor vehicle, until your right to operate has been restored, will be in violation of the laws of this state for which you will be liable to arrest and prosecution.

Sincerely,

Robert E. O'Connell, Jr.

Director of Driver License Services

*Pursuant to 29-A MRSA, Section 2458(2 And 3)

**Pursuant to 29-A MRSA, Section 2458, 5 MRSA Section 9051 (which includes the right to subpoena witnesses) and Chapter 2, Rules for Hearings for the Secretary of State.